## SAJ RANHILL SDN BHD v. SWM GREENTECH SDN BHD & ANOR

HIGH COURT MALAYA, JOHOR BAHRU
AHMAD MURAD ABDUL AZIZ JC
[CIVIL SUIT NO: JA-22NCVC-189-09-2018]
3 JANUARY 2022

**Abstract** – *Naming the proper parties is vital in an action premised on tort. Parties who bear the primary responsibility for a particular debacle, in this case, the owners of a landfill, should be made defendants, and not the mere operators of the landfill.*

***TORT:*** *Damages – Claim for – Claimant suffered damages due to shutdown of water treatment plant – Shutdown allegedly caused by negligent operations and management of solid waste at landfill – Overflow of leachate into stream outside landfill and downstream to river, leading to pollution of river – Whether operators of landfill negligent – Whether operators of landfill owed duty of care to claimant – Whether there was breach of statutory duty – Whether caused nuisance – Whether principle in Rylands v. Fletcher applied – Whether operators liable – Environmental Quality Act 1974, s. 46E*

The plaintiff was a company involved in the operation of water treatment plant ('WTP') along Sungai Benut, Johor. The second defendant was the statutory operator of a landfill ('CEP 1 landfill'), which was located along the banks of Ulu Sungai Benut, until it novated all its rights and obligations concerning the operations of the CEP1 landfill to the first defendant under a novation agreement. The CEP 1 landfill was located about 16km upstream from the plaintiff's WTP. The plaintiff commenced a claim against the defendant, premised on negligence, breach of statutory duty, the principle enunciated in *Rylands v. Fletcher* and nuisance, for damages it suffered due to the shutdown of its WTP on eight separate occasions. According to the plaintiff, (i) the defendants' negligent operations and management of solid waste at the CEP1 landfill led to an overflow of leachate into the stream outside the landfill and into Ulu Sungai Benut, then downstream to Sungai Benut; and (ii) this led to the pollution of Sungai Benut, resulting in a high content of ammonia in the raw water of Sungai Benut, which could not be treated by the WTP, leading to its shutdown. Denying liability and objecting to the plaintiff's claim, the defendants argued that, *inter alia*, (i) there was no causal connection between any incidents of leachate overflow at the CEP 1 landfill and the shutdown of the plaintiff's WTP; (ii) there were other sources of pollution upstream from the plaintiff's WTP. Within 2km upstream from the plaintiff's WTP, there were about four sewerage treatment plants which also released effluents containing ammonia into Sungai Benut; (iii) the second

defendant was not a proper party in this action since the second defendant's obligations and responsibilities, as a statutory operator of the CEP 1 landfill, had been taken over by the first defendant; (iv) no Environmental Impact Assessment was ever lodged or prepared by the State or Federal Government for the CEP 1 landfill or its operations nor was one requisitioned by the Jabatan Alam Sekitar ('JAS') under the Act; (v) the plaintiff, as the downstream operator of the WTP was aware of the risks of pollutants by upstream industries and plantations but, nevertheless, failed to deal with such eventualities. The shutdown was contributed by the plaintiff's own want of care.

**Held (dismissing claim with costs):**

**(1)** The parties who were the primary cause of the whole debacle were the owners of the landfill, instead of the defendants who were mere operators appointed to manage the landfill and the local authorities who, with the same reasonable enquiry and investigation, would have known that such incidents were inevitable, bearing in mind the capacity of the landfill and the dilapidated state of the leachate treatment plant on the site. Those parties bore the primary responsibility for the debacle and should have been made defendants. However, the plaintiff chose to claim only against the defendants. (para 35)

**(2)** There was a duty of care owed by the defendants to the plaintiff although the plaintiff's WTP was about 15km downstream. The foreseeability of harm to other downstream users was plain and obvious. However, no Environmental Impact Assessment was ever lodged or prepared by the State or Federal Government for the CEP 1 landfill or its operations nor was one requisitioned by the JAS under the Act. Since the defendants had not been convicted of any offence under the Environmental Quality Act 1974 by any court of law, the plaintiff failed on the alleged cause of action that the defendants had breached its statutory duty. The plaintiff's claim against the defendants on the issue of liability was dismissed. (paras 32, 36 & 42)

**(3)** The plaintiff's claim under *Rylands v. Fletcher* and nuisance were non-starters and, hence, unsustainable *in limine*. (para 40)

**Case(s) referred to:**

*Batu Kemas Industri Sdn Bhd v. Kerajaan Malaysia & Anor [2015] 7 CLJ 849 CA* ***(refd)***
*Chua Seng Sam Realty Sdn Bhd v. Say Chong Sdn Bhd & Ors And Other Appeals [2012] 7 CLJ 337 CA* ***(foll)***
*Lok Kok Beng & Ors v. Loh Chiak Eong & Anor [2015] 7 CLJ 1008 FC* ***(refd)***
*Lonrho Ltd v. Shell Petroleum Co Ltd (1982) AC 173* ***(refd)***
*Pacific Tin Consolidated Corporation v. Hoon Wee Thim [1967] 1 LNS 118 FC* ***(refd)***
*Pride of Derby & Derbyshire Angling Association Ltd v. British Celanese Ltd (1953) Ch 179* ***(refd)***

*Puncak Niaga (M) Sdn Bhd & Anor v. Syarikat Sidhu Adek Beradek Sdn Bhd & Anor* *[2014] 6 CLJ 382 HC* ***(refd)***
*Tenaga Nasional Malaysia v. Batu Kemas Industri Sdn Bhd & Another Appeal* *[2018] 6 CLJ 683 FC* ***(refd)***

**Legislation referred to:**
Environmental Quality Act 1974, s. 46E
Environmental Quality (Sewage and Industrial Effluents) Regulations 1979, Fourth Schedule

*For the plaintiff - Nor Aishah Abdul Rahman; M/s Aishah A Rahman*
*For the defendants - Saranjit Singh & Dhiya Damia Shukri; M/s Saranjit Singh*

*Reported by Najib Tamby*

## JUDGMENT

**Ahmad Murad Abdul Aziz JC:**

### Introduction

**[1]** The plaintiff is a private limited company involved in the operation of a water treatment plant situated along Sungai Benut ("WTP"). The operations involve the extraction of raw water from Sungai Benut, and the treatment, distribution and sale of treated water to consumers in the state of Johor. The WTP is situated at Simpang Renggam, District of Kluang, Johor.

**[2]** At the material time, the surroundings of Sungai Benut had been gazetted as a water catchment area under the Fourth Schedule of the Environmental Quality (Sewage and Industrial Effluents) Regulations 1979, Environmental Quality Act 1974.

**[3]** The first defendant ("D1") is the statutory operator of a landfill ("the CEP 1 landfill") located at Tapak Pelupusan Ladang CEP, Jalan Kluang, Rengam, Johor, which is along the banks of Ulu Sungai Benut, Johor.

**[4]** The second defendant ("D2") was the operator of the CEP 1 landfill until November 2016, when it novated all its rights and obligations concerning the operations of the CEP1 landfill to D1 under a novation agreement.

**[5]** The plaintiff's claim against the defendants is for damages it suffered due to the shutdown of its WTP on eight separate occasions. The plaintiff alleged that the defendants' negligent operations and management of solid waste at the CEP 1 landfill led to an overflow of leachate into the stream outside the landfill and into Ulu Sungai Benut, then downstream to Sungai Benut. This, the plaintiff says, led to the pollution of Sungai Benut resulting in a high content of ammonia in the raw water of Sungai Benut, which could not be treated by the WTP, leading to its shutdown.

**[6]** The defendants deny any responsibility or liability for the losses and damages claimed by the plaintiff. The defendants aver that there was no causal connection between any incidents of leachate overflow at the CEP 1 landfill and the shutdown of the plaintiff's WTP. The defendants deny that they were negligent in the management and operations of the landfill and state that the steps taken by them were more than reasonable and at times, over and above what was required of an operator of a landfill.

**[7]** The defendants further pleaded that the plaintiff, as the downstream operator of the WTP, was aware of the risks of pollutants by upstream industries and plantations but nevertheless, failed to deal with such eventualities. The shutdown was contributed by the plaintiff's own want of care.

**Background Facts**

**[8]** Both the plaintiff and defendants are not the owners but are contractual operators of the respective landfill and plant. The plaintiff is the operator of the WTP and the defendants are operators of the CEP 1 landfill, which comprises a solid waste landfill and leachate treatment plant ("LTP"). Both are operators for and on behalf of statutory authorities.

**[9]** The CEP 1 landfill, operated by the defendants, is located about 16km upstream from the plaintiff's WTP. The plaintiff complained of eight incidents of shutdown, the details of which are found in the annexure of the plaintiff's statement of claim ("SOC").

**Pleadings: Averments In The Plaintiff's Statement Of Claim**

**[10]** The first incident of shutdown of the plaintiff's WTP occurred on 20 November 2016, when operations had to stop for 12 hours to allow the polluted water to pass through the plaintiff's WTP before resuming operations.

The plaintiff avers that its internal investigations found that the source of pollution was from the CEP 1 landfill, operated by D1.

**[11]** The plaintiff then notified the relevant authorities about the pollution in Sungai Benut. The authority responsible for monitoring the water quality of the rivers in Johor is Badan Kawalselia Air Negeri Johor ("BAKAJ"). The plaintiff avers that its officers, together with officers from BAKAJ, conducted further investigations, which revealed that the source of pollution was untreated effluents from the CEP 1 landfill.

**[12]** The plaintiff avers that the second incident of river water contamination occurred on 23 January 2017. After the second incident, the plaintiff's officers, together with officers from BAKAJ conducted another investigation, which again found the source of pollution to be from the CEP 1 landfill. The pollution was apparently caused by an overflow of leachate from the landfill resulting from heavy rainfall.

**[13]** On 24 January 2017, the plaintiff was informed by the Jabatan Alam Sekitar ("JAS"), that its officers had visited the CEP 1 landfill and discovered that one of the bunds had collapsed, and that the collapsed bund had caused damage to the retention pond which held untreated effluents at the site. The damaged pond caused the untreated effluents to overflow from the pond and spill into Sungai Benut.

**[14]** Both BAKAJ and JAS had directed D1 to repair the bund to avoid future occurrence of spillage of untreated effluents into the river. The plaintiff avers that despite instructions by the authorities, D1 failed to take the necessary steps to repair the bund to avoid another incident of spillage. There were a few other incidents of river contamination, which are elaborated on in the annexure to the plaintiff's SOC.

**Defendants' Defence**

**[15]** The defendants in their statement of defence ("SOD") aver that there are other sources of pollution upstream from the plaintiff's WTP. The defendants claim that within 2km upstream from the plaintiff's WTP, there are about four sewerage treatment plants, which also released effluents containing ammonia into Sungai Benut. Under the Environmental Quality (Sewage) Regulations 2009, sewage treatment plants are allowed to emit up to 50ppm of ammonia as permitted effluent discharge into the waterways surrounding plants.

**[16]** The defendants claim that D2 is not a proper party in this action since D2's obligations and responsibilities as a statutory operator of the CEP 1 landfill had been taken over by D1 under the terms of the novation agreement, which was not in dispute.

The obligations and responsibilities of D2 under the operations and management agreement ("O&M") had been assumed by D1 commencing on 1 November 2016 under the terms of the novation agreement dated 17 July 2017. (Note the commencement of the novation agreement was backdated by the parties to 1 November 2016) Therefore, from 1 November 2016, D2 no longer had authority nor responsibility over the operations of the CEP 1 landfill. As such, the plaintiff does not have any cause of action against D2.

**[17]** From the year 2003 to 2013, the defendants were appointed by Majlis Daerah Simpang Renggam to manage the district of Simpang Renggam's landfills and facilities for the disposal of waste. At the material time, the land on which the CEP 1 landfill is situated was owned by the State Authority of Johor and thereafter, the Government of Malaysia.

**[18]** The average daily waste dumped in the landfill from the district of Simpang Renggam was between 60 to 80 tonnes per day. That weightage was within the capacity of the CEP 1 landfill.

From the year 2007, D2 and thereafter, D1 was put under the supervision of Jabatan Pengurusan Sisa Pepejal Negeri ("JPSPN") for the purpose of monitoring additional waste dumped in the landfill from other districts besides Simpang Renggam.

Additional waste from Batu Pahat, of between 160 and 190 tonnes daily, and from Kluang, of between 140 and 160 tonnes daily, began to be dumped in the CEP 1 landfill. The defendants aver that from 2003 to 2016, the "job scope" of the defendants, as directed by JPSPN, was to only manage waste from the three districts by "levelling and compacting" the waste in the landfill from the three districts.

**[19]** The defendants aver that a third party contractor was awarded the contract to build sanitary cells for the dumpsite/landfill at the CEP 1 site and to build a leachate treatment plant ("LTP") at the landfill.

As operators of the landfill and LTP, the defendants were required to undertake repair and upgrading works to the LTP subject to the approval of the budget for such works by JPSPN.

Due to the dilapidated condition of the landfill facilities and the LTP, the defendants decided to commence repair and upgrading works as approved by JPSPN and the work was completed in the first quarter of 2018. Meanwhile, JPSPN was still considering the defendants' request for an increase in operational capacity of the LTP.

**Damage To The Bund And Leachate Overflow**

**[20]** The defendants aver that from November 2016 when the defendants took over the operations of the CEP 1 landfill and the LTP, the facilities were undergoing repairs and upgrading works, which continued through November 2016 until the first quarter of 2018 in accordance with the plans and approved budget. Before 2016, the defendants had, on their own initiative, undertaken preventive measures to control leachate outflows due to the increase in the amount of solid waste being dumped at the site.

**[21]** The defendants aver that during the period from 2016 to 2017, there were many incidents of unusual rainfall, and this unusually heavy rainfall had caused an overflow of leachate from the leachate pond at the CEP 1 landfill. Considering the fact that these incidents occurred during the period the defendant was undertaking repairs and upgrading works to the facilities, the defendants had done what was in their capacity to do to prevent leachate overflows, despite budget constraints from the statutory authority. The steps taken by the defendants were itemised in para. 40 of the SOD. Among the steps taken, as stated in the SOD, were:

(a) Pelbagai teres blok Gabion telah dibina untuk memperkukuh dan mengukuhkan lagi kapaisti dan integriti ban.

(b) Pelebaran ban tanah dari lebar 4 meter hingga 10 meter di jurang, bersebelahan dengan cell pelupusan sampah tertutup, yang digunakan sebagai kolam tahanan leachate sementara.

(c) Pembinaan dan pendirian tembok batu 1 meter yang semakin meningkat di kolam penahan LTP 1 dan 2 untuk menambah jumlah leachate.

(d) GeoTextile membrane ditambah ke ban untuk memperkuat ban tanah.

(e) Pelindung plastic HDPE telah ditutup di atas cerun pasa sel tempat pelupusan lama untuk mengalihkan hujan dan untuk mengurangkan leachate generation dan peningkatan jumlah leachate di dalam kolam tahanan sementara Cell 2.

(f) Pelbagai pindahan leachate ke pelupusan tapak sanitari lain untuk rawatan untuk meminimumkan jumlah leachate di fasiliti tersebut.

## The Trial

**[22]** Thirteen witnesses gave evidence during the trial. The plaintiff had nine witnesses and the defendants four. The plaintiff relied primarily on its expert witness Dr Maketab bin Mohamed ("PW7") to prove its allegation that the primary contributor to the pollution at Sungai Benut was the defendants' CEP 1 landfill, which resulted in the plaintiff having to shut down its WTP on eight occasions. The report prepared by PW7 is marked as P12.

(i) PW7's answer to question 9.1 on the cause of pollution to Sungai Benut during the incidents of closure of the plaintiff's WTP is as follows:

> My answer will be in the affirmative on the dates of the event as mentioned at the introduction section above. The distance of CEP 1 landfill has little bearing on the presence of ammonia in the water explained above.

(ii) On whether the pollution could have been caused by effluents discharged from the Indah Water Konsortium (IWK) sewerage plants located less than 2km from the plaintiff's WTP or the poultry farms located less than 10km from the WTP, his reply was:

> My answer will be in negative. As explained above, the discharge from the IWK sewerage from the town of Simpang Renggam and Simpang Renggam prison are minimal continuous discharge with minimum pollution load as compared to the deluge coming from the CEP Estate Landfill especially due to overflowing or bund breach of the leachate ponds.

**[23]** Thus, it is the opinion of PW7 that the cause of ammonia pollution in Sungai Benut on the dates of the shutdown was the leachate overflow from the CEP 1 landfill.

**[24]** PW7's comments on the overall cause of pollution to Sungai Benut is noteworthy because although he had identified the CEP 1 landfill as the primary contributor of high ammonia content in Sungai Benut, he put the blame squarely on the authorities for their failure to anticipate the highly likely incidents of pollution by choosing the location of a landfill upriver from the plaintiff's WTP.

**[25]** In his reply to the plaintiff's counsel during re-examination, he states (at p. 24 of the plaintiff's submission and p. 325 notes of evidence), as follows:

> Basically supposedly one has knowledge about a problem if we have something like a landfill upstream from water intake. So we discuss along this line as why planners don't think along that line. I mean we discuss something on professional judgment why this happened? **Why Majlis Daerah Simpang Renggam did not think about what to happen you know, because water intake is already there**.
>
> (emphasis added)

**[26]** PW7's reply to the question, "how do you think the pollution happened," (reproduced at p. 44 of the plaintiff's written submission), is as follows:

> The basic rule of the field of watershed management, the presence of SWM Ladang CEP Landfill upstream of Simpang Renggam Water Treatment Plant is a **BIG No-No** due to the very high risk of possible contamination. The Simpang Renggam Water Treatment Plant is designed to treat only raw water which complies to the class I and class IIA of the Malaysian Water Quality Standards (ambient water quality standards), therefore any possible sources of pollution within the watershed/water catchment **should not be allowed to operate at all**.
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> (emphasis added)

**[27]** PW7 further stated that figures 9 to 11 of his report indicated the leachate treatment ponds were not well designed and managed, with floating trash and leachate brimming to overflowing, which also indicated the leachate treatment to be under-designed and wastewater not treated well (short retention time) before being discharged into Sungai Ulu Benut.

The ammonia pollution of Sungai Ulu Benut could have occurred in three scenarios:

(i) continuous contamination from the discharge of the (not fully) treated leachate;

(ii) contamination due to overflowing leachate from the treatment ponds; a scenario that can occur during the rainy season due to the higher production of leachate which can easily overwhelm under-designed treatment ponds;

(iii) a treatment pond breach due to the pond wall collage.

**[28]** The above evidence by PW7, the plaintiff's own expert witness, was not challenged by the plaintiff's counsel (which is understandable since PW7 is the plaintiff's own expert witness). Meanwhile, the defendants' counsel challenge of the evidence by PW7 was on his biasness against having the location of the landfill upstream from the plaintiff's WTP and the source of his investigation and reports, which, apparently, were collated by him even before his appointment by the plaintiff. The defendants' alleged that PW7 had already formed his opinion even before being appointed to prepare the report and therefore, his report is not totally independent.

**[29]** In attempting to convince this court to accept the evidence of its expert witness as truthful and credible despite the challenge to his impartiality, the plaintiff's counsel brought the attention of this court to the statement by the JCA in the case of *Batu Kemas Industri Sdn Bhd v. Kerajaan Malaysia & Anor* [2015] 7 CLJ 849; [2016] 1 MLRA 36, where the JCA held:

> In this case, a number of experts were called by the parties for the purpose of obtaining their professional assistance and with the intention of relying on their evidence. It is the primary duty of an expert to assist the court in arriving at the right decision; even if he compromises the case of the party who called him and is paying for his services.

In the present case, I find that PW7 has done just what the JCA said in the paragraph above. Although PW7 has established by his evidence that the source of ammonia in the waters of Sungai Benut was primarily from the defendants' landfill, he, however, puts the blame for the whole debacle on the authorities, including the owner of the landfill for the poor design of the facilities and for locating the landfill upstream from the plaintiff's WTP and the local authorities for insisting that the defendants accept waste from other districts, thus, overwhelming the capacity of the landfill to contain and treat the waste.

**[30]** The opinion of PW7 was supported by the evidence of the witnesses called by the defendants.

In answer to the question, "What was the cause of these incidents of overflow?" the defendants' witness, DW1, answered as follows:

> I believe the cause of these incidents results from the overloading of the Active Cell, which is the original dumping ground, which created a risk of leachate overflowing by reason of the construction of the new cells that were never completed by previous contractors of JPSPN.

**[31]** The defendants' witnesses in particular D1 and D3 gave evidence to show the steps taken by the defendants to prevent further spillage of leachate from the landfill after the first incident of leachate overflow into Sungai Ulu Benut. The defendants' witnesses gave evidence with regard to what they did as itemised in para. 40 of the SOD. They detailed the preventive measures taken by them to prevent leachate overflows during heavy rainfall.

A **Submissions By The Plaintiff On Causes Of Actions**

**[32]** The plaintiff pleaded the following causes of action against the defendants, namely:

(i) negligence;

B (ii) nuisance;

(iii) *Rylands v. Fletcher*; and

(iv) breach of statutory duty.

C Based on the pleadings and evidence tendered in court, negligence appears to be at the heart of the plaintiff's claim. Hence, I will deal with this submission first.

It is trite law that the elements of the tort of negligence are;

(i) existence of a duty of care by the defendant to the plaintiff;

D (ii) a breach of that duty;

(iii) the defendant's breach caused the damages suffered by the plaintiff (causation).

(iv) the resulting damage is not remote.

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Applying the principles enunciated in *Chua Seng Sam Realty* above to the factual matrix of the present case, I find that there is a duty of care owed by the defendants to the plaintiff although the plaintiff's WTP is about 15km downstream. The foreseeability of harm to other downstream users is plain and obvious.

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**Breach Of Duty Of Care**

**[33]** As I have stated in the earlier paragraphs, the defendants deny they had breached their duty of care towards the plaintiff, and had provided details of the steps taken within their financial capacity to prevent future occurrences of spillage or leakage of leachate from the CEP 1 landfill. Evidence of the steps taken by the defendants were given by the defendants' witnesses DW2 and DW3. Under cross-examination by the plaintiff's counsel, they were steadfast in their insistence that the actions taken were the only steps the defendants could have taken pending the approval of the upgrading of the LTP and expansion of the landfill's capacity by the authorities/owners of the landfill.

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## Causation

**[34]** In *Chua Seng Sam Realty Sdn Bhd v. Say Chong Sdn Bhd & Ors And Other Appeals* [2012] 7 CLJ 337; [2013] 2 MLJ 29, the Court of Appeal held:

> ... it is trite law that in an action for negligence the plaintiff has to prove that the defendant's act was the **effective** cause of the injury suffered by the plaintiff. Without a causation link being established by the plaintiff, the claim cannot succeed ...
>
> (emphasis added)

In para. 44, the court then applied the "but-for" test to determine causation ie, whether the damage would not have been caused but for the defendant's conduct/omission.

**[35]** Applying the principles enunciated in *Chuah Seng Sam Realty* above to the factual matrix of the present case, I find that the primary cause of the spillage of leachate from the ponds which then caused an excessive amount of leachate flowing into Sungai Ulu Benut, and then into Sungai Benut are:

(i) the location of the CEP1 landfill upstream, which is a high-risk factor;

(ii) the poorly designed landfill, which could not handle the incidences of unusually heavy rainfall, that did occur during the periods of leachate overflow and bund collapse; and

(iii) the decisions by the local authorities to dump waste from other districts in the CEP 1 landfill, which was way beyond the capacity of the landfill to handle.

Thus, the parties who were the primary cause of the whole debacle were the owners of the landfill (instead of the defendants who were only operators appointed to manage the landfill) and the local authorities, who, with same reasonable enquiry and investigation, would have known that such incidents are inevitable, bearing in mind the capacity of the landfill and the dilapidated state of the LTP on the site.

Those parties bear the primary responsibility for the debacle, and should have been made defendants. However, the plaintiff chose to claim only against the defendants.

**[36]** Additionally, as submitted by the defendants, throughout the period, no Environmental Impact Assessment (EIA) was ever lodged or prepared by the State or Federal Government for the CEP 1 landfill or for its operations, nor was one requisitioned by JAS under the Environmental Quality Act 1974 for Majlis Daerah Simpang Renggam or JPSPN to conduct landfill operations upstream from Sungai Benut, which was a designated water catchment area. This was undisputed and confirmed by the JAS officer, PW5.

A Finally, when the authorities realised that the only cost-effective way to prevent further pollution of Sungai Benut was to shut down the landfill, they decided to close the CEP 1 landfill and move the landfill to other districts in Johor. This decision, in itself, is evidence that the wrong location of the landfill by the authorities was the primary cause of the pollution of Sungai B Benut during the periods of unusually heavy rainfall resulting in the closure of the plaintiff's WTP.

**Other Causes Of Actions**

**[37]** I shall now deal briefly with the alternative causes of action framed C by the plaintiff:

(i) *Rylands v. Fletcher* and Nuisance

Both involve interference with land belonging to the plaintiff. The medium of pollution is the river and the river belongs to the State. The plaintiff's complaint is that there was an "escape" of leachate from the D CEP 1 landfill which is upstream and inland along Sungai Ulu Benut, which later flows into Sungai Benut passing the plaintiff's WTP. The river is State property. For a party to have a cause of action against another party, the first party must be a "riparian proprietor" of land abutting the river before it can claim or sue for damages from polluters.

E (ii) The plaintiff in its submission on this issue from para. 296 onwards refers to the elements of the torts of nuisance and *Rylands v. Fletcher*. The material fact in *Rylands v. Fletcher* was reproduced in the judgment of the court in *Pacific Tin Consolidated Corporation v. Hoon Wee Thim* [1967] 1 LNS 118; [1967] 2 MLJ 35 (116). The facts in *Rylands v. Fletcher* F (*supra*) may be stated as follows:

> There, the defendant had employed contractors to build a reservoir on his land to supply water for his factory. The contractors negligently failed to block a disused mineshaft and when the reservoir was filled to the brim, the plaintiff's adjoining mine was G flooded. At first instance, Blackburn J in his judgment, aptly said:
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> > We think that the true rule of law is that the person who, for his own purposes, **brings onto his land** and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so, is *prima facie* answerable H for all the damage which is the natural consequences of its escape.
>
> (emphasis added)

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> Applying the very principle of law enunciated by Blackburn J in *Rylands v. Fletcher* above, it appears to me that it is the owner of the land who allows the landfill and LTP to be constructed on the land and allows leachate to collect on such land that would be liable if the leachate escapes and not the contractor, whose job scope is only to operate and manage the landfill and the LTP. This is consistent with my view that it is the owners of the landfill and LTP that should be held liable, if at all, and not the defendants, that had no say in the decision to locate the landfill upstream from the plaintiff's WTP.

**[38]** Another point submitted by the defendants with regard to why the principle under *Rylands v. Fletcher* does not help the plaintiff's case is that the plaintiff is not a "riparian proprietor" of the land abutting the river to have *locus standi* to claim for damages resulting from the pollution.

Unfortunately, the plaintiff's lawyer, in her lengthy submission, did not address this issue of riparian proprietor.

**[39]** The defendant quoted *Stroud's Judicial Dictionary of Words and Phrases* for a definition of riparian owner as follows:

> A Riparian owner is one **whose land** abut in and is part of the bank of a river or a stream.
>
> (emphasis added)

In *Pride of Derby & Derbyshire Angling Association Ltd v. British Celanese Ltd* (1953) Ch 179, 200, the Court of Appeal adopted the principle enunciated in *John Young*, where Lord MacNaughten held:

> ... every riparian proprietor is entitled to have natural water of the stream transmitted to him without sensible alteration in its character or quality. An invasion of this right causing actual damage entitles him to the intervention of the courts.

In fact, in *Pride of Derby*, there was explicit recognition by the court that the plaintiff's claim was saved by involvement of the riparian owner as co-plaintiff in the action (see Evershed MR at p. 200).

**[40]** Having considered the authorities cited above, I am in agreement with the defendants' submission that the plaintiff's claim under nuisance and *Rylands v. Fletcher* are non-starters and hence, unsustainable *in limine*.

**Breach Of Statutory Duty**

**[41]** In para. 23 of the SOC, the plaintiff also pleaded a breach of statutory duty by the defendants in conjunction with the cause of action of negligence.

The defendants submit that this alleged cause of action is inapplicable for the following reasons:

(i) The plaintiff relied on the case of *Puncak Niaga (M) Sdn Bhd & Anor v. Syarikat Sidhu Adek Beradek Sdn Bhd & Anor* [2014] 6 CLJ 382; [2015] 8 MLJ 586. The claim in *Puncak Niaga* above is based on the Environmental Quality (Sewage and Industrial Effluents) Regulations 1979, which has been repealed and thus, has no application to the present case.

(ii) Even if the Regulations are applied, the right of the plaintiff to seek remedy, which is a private law right to enforce a breach of statutory duty, is prohibited (see *Lonrho Ltd v. Shell Petroleum Co Ltd* (1982) AC 173, p. 185).

(iii) Finally, the Environmental Quality Act 1974 was not intended to allow the public to institute a private action against another on account of a breach of statutory duty. In support of this final contention, the defendants cite s. 46E of the Environmental Quality Act 1974 which prescribes the right to compensation following a conviction by a court of law in a criminal proceeding. Section 46E provides:

> After a person has been convicted for an offence against this Act or any regulations made thereunder court may order the person so convicted to pay the other person's cost and damages incurred or compensation for the loss or damage to property in the amount as the court considers fit.

**[42]** In the present case, since the defendants have not been convicted of any offence under the Environmental Quality Act 1974 by any court of law only issued compounds by the authorities, I agree with the defendants' submission that the plaintiff fails on this alleged cause of action.

For the above-mentioned reasons, I dismiss the plaintiff's claim against the defendants on the issue of liability.

Notwithstanding my findings on the issue of liability, I shall still deal with the issues of loss and damages, if and in the event the Court of Appeal is not with me on the issue of liability.

**Damages**

**[43]** The plaintiff did not plead any physical damage to the assets of the plaintiff caused by the incidents of shutdown of the WTP. The plaintiff's claim is for pure economic loss, which the defendants submit cannot be claimed without physical damage.

The head of damages pleaded by the plaintiff are as follows:

(i) loss of profits/sale of treated water;

(ii) expenses for renting water tankers;

(iii) upgrading of the plaintiff's WTP;

(iv) alternative water supply.

**[44]** It is noted that the bulk of the plaintiff's claim is for upgrading the plaintiff's WTP processes (see para. 43 D of the SOC) under the heading penambah baik process rawatan air amounting to RM941,704 and to kerugian yang dialami akibat penutupan LRA (financial loss due to the shutdown of the WTP), amounting to RM406,669.90.

**Pure Economic Loss And Upgrading Work**

**[45]** In *Tenaga Nasional Malaysia v. Batu Kemas Industri Sdn Bhd & Another Appeal* [2018] 6 CLJ 683; [2018] 5 MLJ 561, Jeffrey Tan FCJ held that pure economic loss independent of physical damage to the plaintiff's property or assets is not recoverable. Jeffrey Tan FCJ also referred to *Lok Kok Beng & Ors v. Loh Chiak Eong & Anor* [2015] 7 CLJ 1008; [2015] 4 MLJ 734, where the Federal Court extended the policy, to private bodies to deny recovery for pure economic loss against professionals.

**[46]** A substantial part of the plaintiff's claim amounting to RM941,704 is for upgrading work to the plaintiff's WTP. It is clear that these expenses were not due to any physical damage to the WTP but to increase the capacity of the WTP to deal with future incidents of pollution.

The plaintiff in its submission in answer to the question posed by this court whether upgrading costs, which are unrelated to any physical damage to its assets, can be allowed, submits that upgrading of the plaintiff's WTP capacity was part of the mitigation process in anticipation of future pollution of the river from the CEP 1 landfill.

**[47]** The plaintiff submits in para. 1.2 as follows:

> 1.2 The upgrading of the WTP is very much **necessary** in anticipation of future incidents of pollution whereby the plaintiff can then treat water with higher ammonia level. The upgrading must be within the contemplation of the defendant as something that would be done by the plaintiff or any other entity faced with the recurring pollution.
>
> 1.4 It is highly likely that the plaintiff would suffer future damage if they do not improve their WTP. With the initial capacity and the capacity of the water assets, they could not treat excessive ammonia of more than 5 mg/l. Only when they have upgraded the WTP that polluted water with more than 5 mg/l ammonia can be treated.
>
> (emphasis added)

A **[48]** The plaintiff could not provide any authorities to support this submission and I find the submission to be without any merit. It is trite law that damages are meant to be compensation for the loss already suffered, and upgrading of the WTP in anticipation of higher levels of ammonia is not a form of compensation. In fact, this very point was relied on by Jeffrey Tan
B FCJ in *Tenaga Nasional Bhd v. Batu Kemas* (*supra*) to find that the plaintiff was contributorily negligent for failing to upgrade its systems. This requirement was raised to support the defence of contributory negligence on the plaintiff's part.

## Conclusion

C **[49]** Since no physical damage to the plaintiff's assets was pleaded and losses pleaded are in essence for economic loss, I would have only allowed nominal damages to the plaintiff had I found the defendants liable.

**[50]** For the reasons given above, I dismiss the plaintiff's claim with costs
D of RM50,000.

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